IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, et al.,
Appellants,

-vs-

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

AMICUS CURIAE BRIEF OF THE STATE OF NORTH CAROLINA

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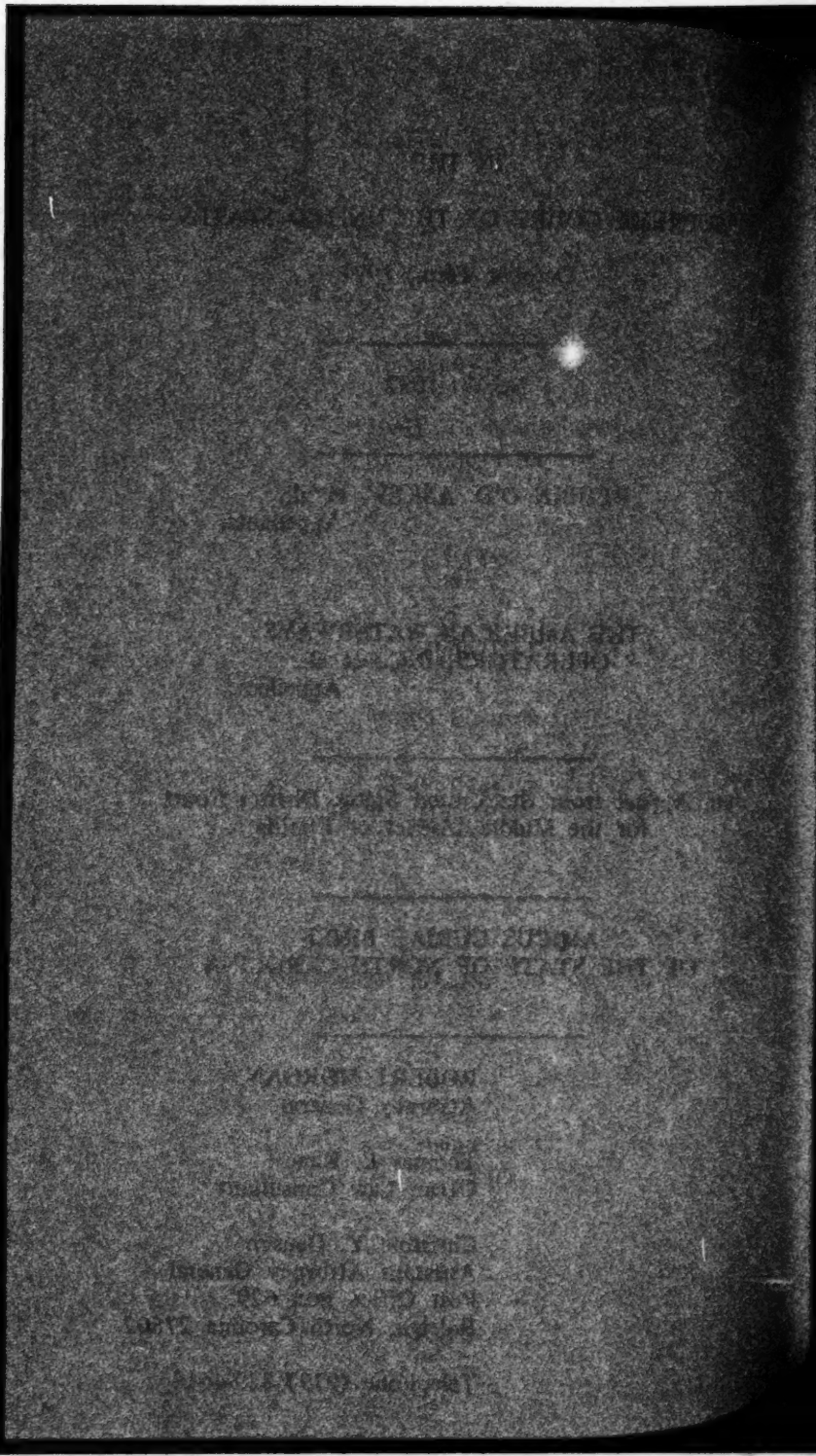

TABLE OF AUTHORITIES

Cases:

Federal Statutes:

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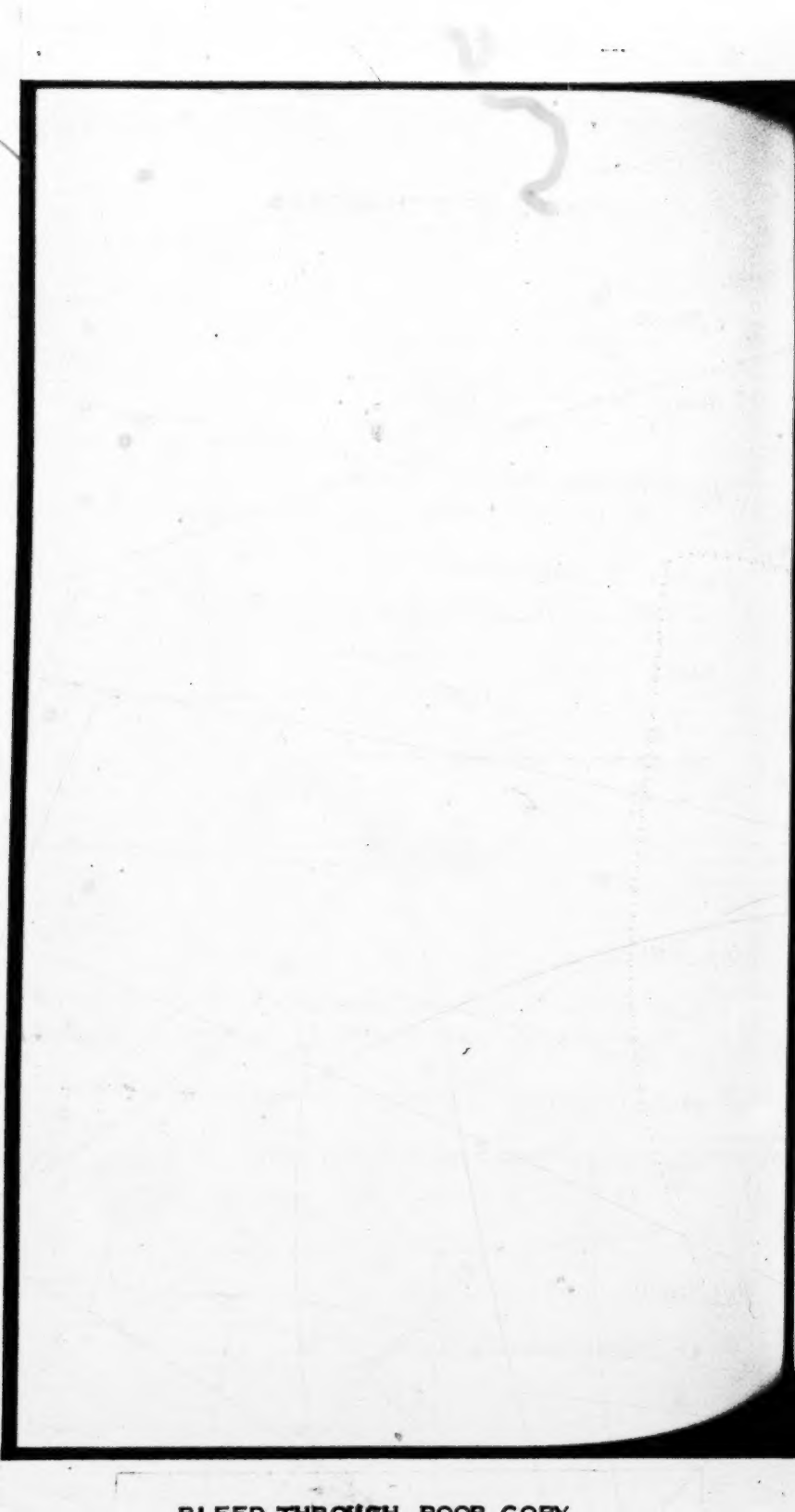

Miscellaneous:

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INTEREST OF AMICUS CURIAE

The State of North Carolina has a general coastline (bordering the Atlantic Ocean) extending approximately 301 miles from Virginia to South Carolina. This, however, is less than 10 percent of the total tidal coastline in North Carolina. According to the United States Department of Commerce, North Carolina has 3,375 miles of tidal shoreline. This shoreline surrounds the many bays, sounds, and rivers of North Carolina and encompasses 2,200,000 acres of estuaries that are vital to marine organisms.

The United States Department of the Interior was directed by the Estuarine Areas Act of 1968 (16 U. S. C. § 1221 *et seq.*) to study the nation's estuaries to evaluate, among other things, their value as ecosystems. One area studied was the Pamlico-Albemarle-Currituck Sound complex of North Carolina which takes in over 2,000,000 acres, or 90 percent, of North Carolina's estuaries. The report which resulted from that study estimated that:

> "(A)bout 60 percent of all the United States' commercial finfish and shellfish and most marine sport fish inhabit estuaries during all or part of their life cycles. *This estuary is even more important to the North Carolina commercial fishery*. Estimates indicate that about 90 percent of the State's commercial finfish and shellfish harvest is dependent upon estuarine environments." *National Estuary Study*, U. S. Dept. of Interior, Vol. 3, App. B, pp. 112-144. (*Emphasis supplied.*)

The report further stated that this area (both land and water) studied was one of the largest relatively unspoiled natural areas on the eastern coast of the United States.

The two principal industries of eastern North Carolina are commercial fishing and recreation, which includes sport fishing, hunting, bathing, boating, and related activities. These activities all depend upon the favorable conditions of the North Carolina estuaries and the adjacent private and public lands, which in turn directly affect the economy of the State.

Thus North Carolina's interest in protecting its estuaries from deleterious substances is by no means slight. It is basic to the interests of the people it is charged to represent. The damage which can result from oil pollution could be disastrous to the commercial and sport fishing industries (not only because of its effects on the estuarine water itself, but also its effects on the marshlands, oyster beds and mud flats on which these fisheries so vitally depend) and to the recreational beaches of the State.

North Carolina, therefore, has considerable concern over the issues involved in this cause and believes that it has a legitimate

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interest in the substantial questions raised by the ruling of the three-judge panel of the United States District Court for the Middle District of Florida.

QUESTION PRESENTED

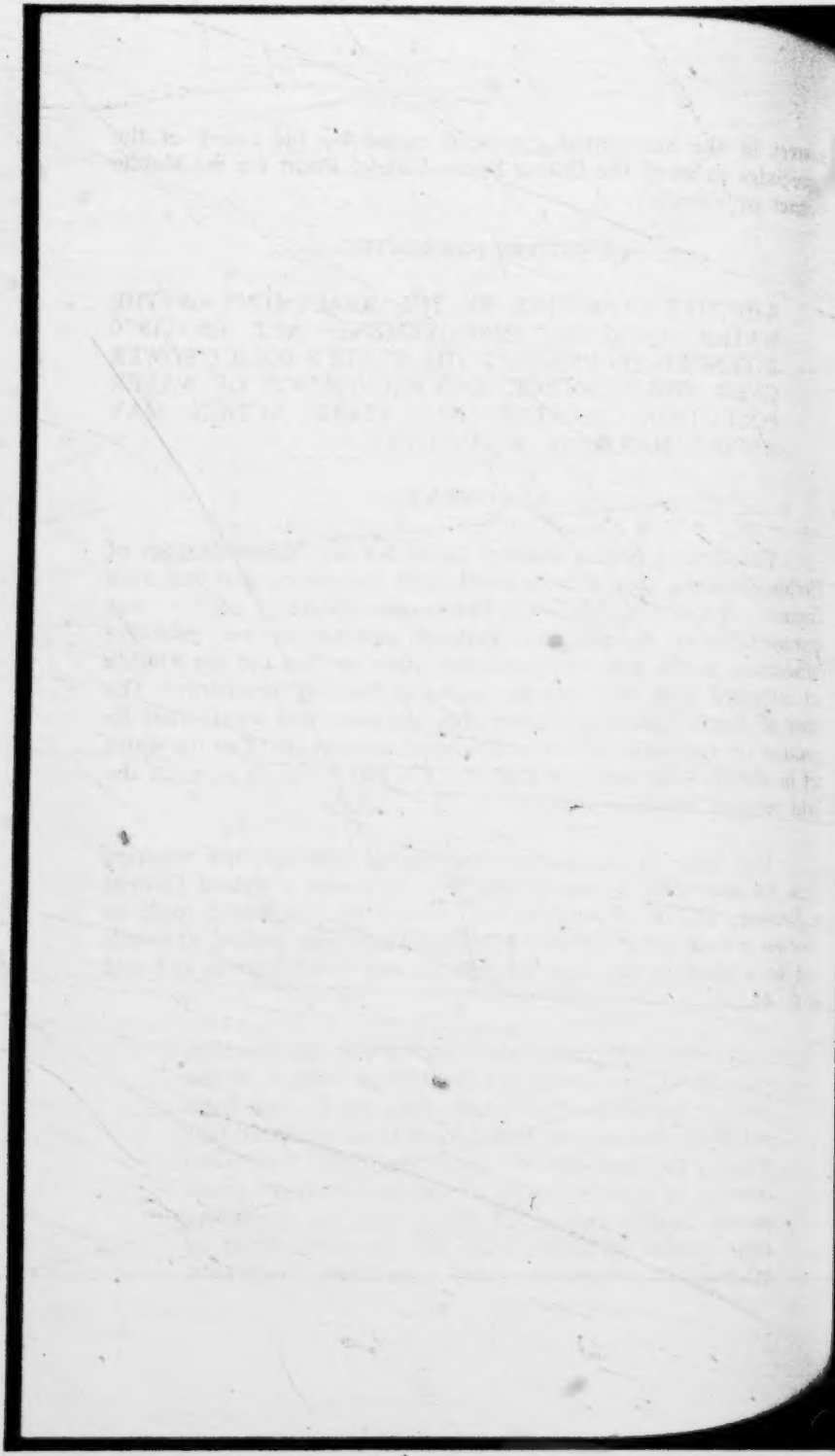
WHETHER CONGRESS BY THE ENACTMENT OF THE WATER QUALITY IMPROVEMENT ACT OF 1970 INTENDED TO PREEMPT THE STATE'S POLICE POWER OVER THE CONTROL AND PREVENTION OF WATER POLLUTION BECAUSE THE STATE ACTION MAY AFFECT MARITIME ACTIVITIES?

ARGUMENT

The United States District Court for the Middle District of Florida declared that Florida's Oil Spill Prevention and Pollution Control Act (Ch. 70-244, Laws of Florida, 1970) was unconstitutional because the Federal government has exclusive jurisdiction in the area of substantive maritime law and the Florida act infringed into this area of exclusive Federal jurisdiction. The State of North Carolina believes this was error and would state its position on the basis of two additional questions: (1) Can the states act in the area of maritime law? and (2) Did Congress preempt the field relative to oil pollution?

The State of North Carolina believes that the first question must be answered in the affirmative. In *Huron Portland Cement v. Detroit*, 362 U. S. 440 (1960), this Court addressed itself to whether a *local* air pollution ordinance which was applied to vessels tied to a dock in the City of Detroit was constitutional and said at p. 442:

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, *the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities,*



> *concurrently with the federal government. Gibbons v. Ogden*, 9 Wheat. 1; *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299; *The Steamboat New York v. Rea*, 18 How. 223; *Morgan v. Louisiana*, 118 U. S 455; *The Minnesota Rate Cases*, 230 U. S. 352; *Wilmington Transp Co. v. California Railroad Comm.*, 236 U. S. 151; *Vandalia R. Co. v. Public Service Comm.*, 242 U. S. 255; *Stewart & Co. v. Rivara*, 274 U. S. 614; *Welch Co. v. New Hampshire*, 306 U S. 79. (*Emphasis supplied.*)

In view of this clear statement and the many decisions by this Court cited, *supra*, exemplifying other areas in which the police power was held to justify regulation of interstate and maritime commerce, North Carolina contends it was error for the United States District Court for the Middle District of Florida to base its decision that the Florida law is unconstitutional on the grounds that "substantive maritime law . . . is exclusively within the Federal domain." *The American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241, 1246 (M D. Fla. 1971).

The second question as to whether Congress has preempted the field relative to oil pollution must, we think, be answered in the negative. Water Quality Improvement Act, 33 U.S.C. § 1161. This Court has stated that the only controversial question is "whether Congress intended to make its jurisdiction exclusive." *Head v. New Mexico Board*, 374 U. S. 424, 430 (1963), citing *California v. Zook*, 336 U. S 725, 731 (1949), and *Kelly v. Washington*, 302 U. S 1, 10-13 (1937).

This *Amici* believes that it is clear that Congress did not intend to preempt the field relative to oil pollution and cites for authority the Water Quality Improvement Act, 33 U S.C. §1161 (o) (2):

> "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such state."

Looking at the legislative history of that Act, such intent was clearly

set out in the Conference Committee Report:

> (2) of subsection (o) disclaims any intention of preempting any State or political subdivision from imposing any requirement or liability with respect to the discharge of oil into waters in that State. Thus, *any State would be free to provide requirements and penalties similar to those imposed by this section or additional requirements and penalties.* These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts." Conf. Rep. No. 91-940, 1970 U. S. Cong. and Admin. News, p. 2727. (*Emphasis supplied.*)

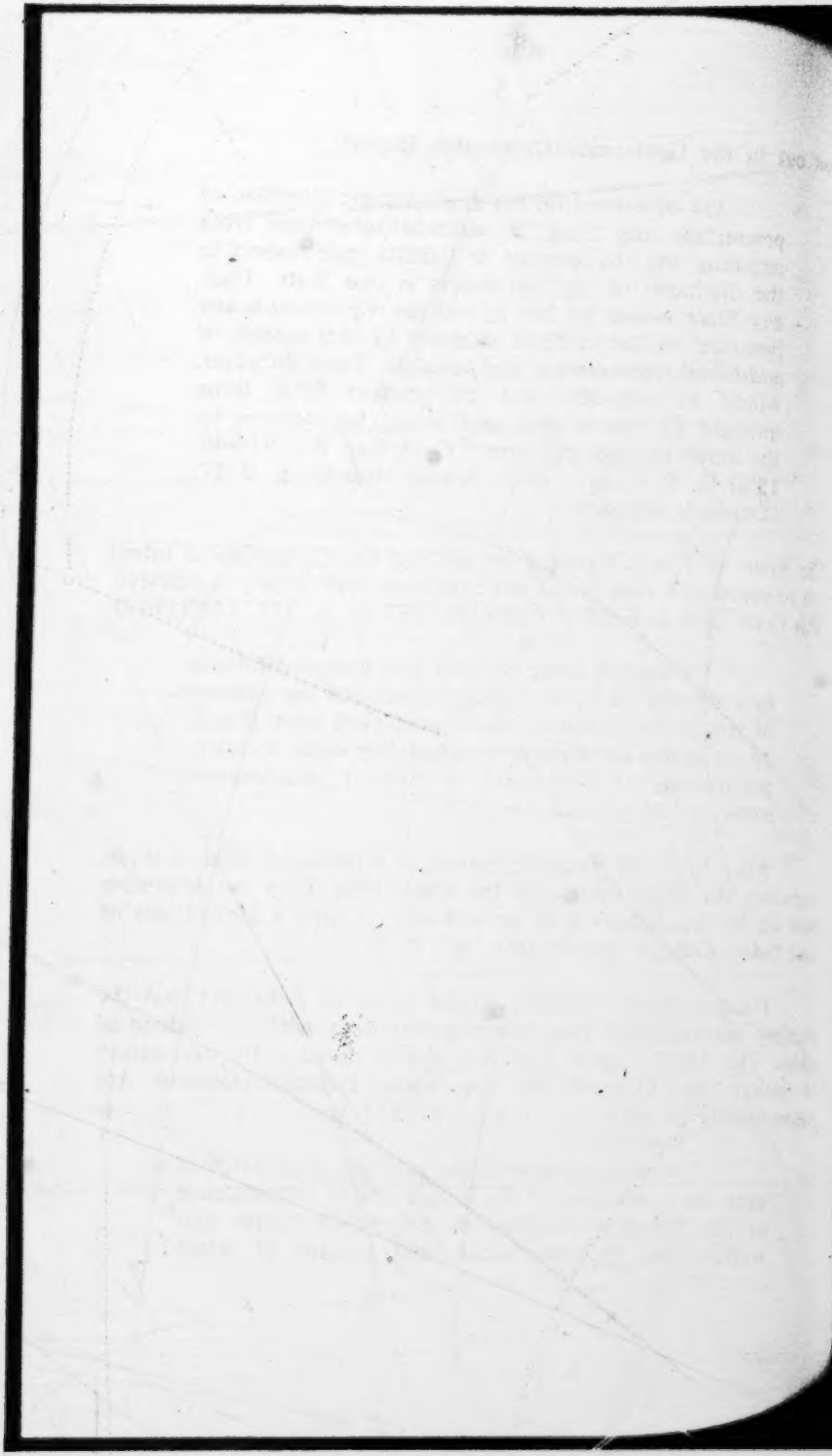
The State of North Carolina argues that the Congressional intent not to preempt a field could not have been more clearly manifested. This Court said in *Reid v. Colorado*, 187 U. S. 137, 148 (1902):

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." (Reiterated in *Kelly v. Washington, supra*, p. 11)

When Congress passes legislation in a particular field, it is not necessary for them to occupy the whole field. They can determine how far its regulations shall go and only occupy a limited area of that field. *Kelly v. Washington, id*, p. 9.

Finally, North Carolina would argue to the Court that the primary responsiblity over water pollution is with the individual states. This the Congress itself has clearly stated in the declaration of policy by Congress in the Water Pollution Control Act Amendments of 1956, 33 U.S.C. § 1151 (b):

> "In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water



> pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution. . . ."

A similar intent of Congress to recognize the primary responsibility of States and local government is evident in the Air Quality Act of 1967 (42 U.S.C. 1857), and this Court recognized the importance of such local concern in *Huron Portland Cement v. Detroit, supra* Certainly the concern over water pollution by the state and local community is as great as that over air pollution.

As this Court said in *Kelly v. Washington, supra*, pp. 9, 10:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases*, 230 U. S. 352, 402.

Not only did Congress not intend to preempt the field of water pollution control merely because it affects interstate commerce, but they specifically encouraged the states to concern themselves with the abatement of pollution in *interstate* waters. See 33 U.S.C. § 1160 (b) which provides:

> "Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action."

CONCLUSION

Based on the foregoing arguments, the State of North Carolina believes that the United States District Court for the Middle District of Florida committed error which could result in the serious curtailment of the police powers of the states to protect their citizens and property from the serious consequences of pollution.

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Therefore, the State of North Carolina prays the Court to reverse the judgment of the United States District Court for the Middle District of Florida.

Respectfully submitted,

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PROOF OF SERVICE

I, Christine Y. Denson, hereby certify that on the _____ day of June, 1972, I served three copies of the above Amicus Curiae Brief of the State of North Carolina by first-class mail, prepaid, at the United States Post Office at Raleigh, North Carolina on all attorneys of record.

Christine Y. Denson
Assistant Attorney General